Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition for Waiver of Papa Murphy's Holdings, Inc. and Papa Murphy's International L.L.C.	)	CG Docket No. 02-278 DA 16-1179
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	
Petitions for Waiver and/or Retroactive Waiver of 47 CFR Section 64.1200(a)(2) Regarding the Commission's Prior Express Written Consent Requirement	)	

PETITION FOR RECONSIDERATION OF RETROACTIVE WAIVER TO PAPA MURPHY'S HOLDINGS, INC. AND PAPA MURPHY'S INTERNATIONAL L.L.C.

TABLE OF CONTENTS

INTRODUCTION

In the above captioned order, the Consumer and Governmental Affairs Bureau granted a waiver from the prior express written consent requirements in 47 C.F.R. § 64.1200(a)(2) to Papa Murphy's[1] and six other petitioners (hereinafter, the "Waiver Order").[2] Through this Petition for Reconsideration, and pursuant to 47 C.F.R. § 1.106(d)(1), the Petitioners herein respectfully request the withdrawal of the Waiver Order as to Papa Murphy's.

In granting the waiver, the Bureau erred in several material respects. First, the Bureau failed to articulate a relevant standard for establishing good cause for a waiver, as required by well-settled case law. Second, the Bureau failed to require Papa Murphy's to adduce concrete and particularized support establishing special circumstances warranting a waiver. Indeed, Papa Murphy's did not allege in its petition for a waiver that it was "confused." Yet the purported basis of the Waiver Order was that Papa Murphy's had been confused by language in the Commission's order dated February 15, 2012, which first announced the prior express written consent requirements. *See In re Rules & Regs. Implementing the TCPA of 1991*, 27 FCC Rcd. 1830, 1836 (Feb. 15, 2012) (hereinafter "2012 Order"). The Bureau compounded this error by ignoring evidence that Papa was not confused, but simply unaware of the 2012 Order until mid-2015 when it was sued in federal District Court. As the Commission has recognized, simple ignorance of the Telephone Consumer Protection Act ("TCPA") or its attendant regulations is not grounds

[1] "Papa Murphy's" herein refers to Papa Murphy's Holdings, Inc. and Papa Murphy's International L.L.C.

[2] *See In re Rules & Regs. Implementing the TCPA of 1991 Petitions for Waiver and/or Retroactive Waiver of 47 CFR Section 64.1200(a)(2) Regarding the Commission's Prior Express Written Consent Requirement*, CG Docket No. 02-278 ¶ 1 (Oct. 14, 2016).

for a waiver. In these circumstances, it is not surprising that the Bureau did not make a specific finding that a waiver was in the public interest. Accordingly, the Waiver Order should be withdrawn.

In the alternative, Petitioners seek modification of the Waiver Order to affirm that the order does not extinguish private statutory claims and does not deprive the federal District Court presiding over *Lennartson v. Papa Murphy's Holdings, Inc.*, No. 3:15-cv-05307 (W.D. Wash.), of its jurisdiction or vitiate its previous findings and orders. The Bureau's issuance of a retroactive waiver to Papa Murphy's violated several legal principles and, under the doctrine of separation of powers, the Bureau cannot impair a Congressionally created private right of action. For these reasons, and as further discussed below, Petitioners request that the Waiver Order be withdrawn or modified.

PETITIONERS' STANDING TO SEEK RECONSIDERATION

Petitioner John Lennartson is a plaintiff in the *Lennartson* case, a nationwide class action proceeding in the U.S. District Court for the Western District of Washington against Papa Murphy's for violations of the TCPA in sending text messages advertisements. Petitioner Susan Shay Nohr (along with several other individuals) intends to join the *Lennartson* class action as a named Plaintiff, is part of the putative class, and received text messages from Papa Murphy's in violation of the TCPA. Papa Murphy's contends that Lennartson and Nohr's legal claims are barred by the limited administrative waiver of the TCPA's prior express consent requirement it received from the Chief of the Consumer and Governmental Affairs Bureau on October 14, 2016 (i.e., the Waiver Order). Therefore, Lennartson and Nohr are aggrieved persons who are adversely affected by the Waiver Order and have standing under 47 C.F.R. § 1.106(b)(1) to seek reconsideration.

Petitioner Lennartson participated in the proceeding that led to the Waiver Order by filing a comment in opposition to Papa Murphy's petition. *See Lennartson Opp'n to Papa Murphy's Pet. for Waiver*, CG Docket No. 02-278 (filed Apr. 21, 2016). Petitioner Nohr did not participate in the proceeding, however, because she was not aware of the class action claims proceeding against Papa Murphy's at the time of the petition, and did not receive adequate constitutional notice of an opportunity to comment and oppose the petition.[3] When an agency has failed to provide constitutionally adequate notice of a proceeding, "the availability of agency reconsideration and appeal provide sufficient avenues of redress and rectification to meet the requirements of due process." *Lepre v. Dep't of Labor*, 275 F.3d 59, 71 (D.C. Cir. 2001). Therefore, Petitioner Nohr is entitled to seek reconsideration under 47 U.S.C. § 1.106(b), and has shown good cause why it was not possible for her to participate in the earlier stages of this proceeding. *See* 47 C.F.R. § 1.106(b)(1).

[3] It is well settled that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). Therefore, before a party's property interest in a cause of action may be eliminated or otherwise affected, the party must be given "constitutionally adequate notice and hearing procedures." *Id.* at 429. "[N]otice by publication [is] not reasonably calculated to provide actual notice of [a] pending proceeding and [is] therefore inadequate to inform those who could be notified by more effective means such as personal service or mailed notice." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795, 797 (1983); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) (discussing constitutional inadequacy of notice of publication in a newspaper and holding that "[i]n weighing its sufficiency … with actual notice we are unable to regard this as more than a feint"). Here, Papa Murphy's did not notify or serve any putative class members with its petition for waiver, despite seeking the waiver to undermine their legal claims. Similarly, the Bureau never served Petitioner Nohr, by mail or otherwise, with its notice seeking comment on Papa Murphy's petition. Finally, as is apparent from the case law cited above, the Bureau's publication of its March 22, 2016, notice on the FCC website was not constitutionally adequate notice that the Bureau was considering taking action that would attempt to undermine the class claims in the *Lennartson* case. *See, e.g.*, *Mennonite*, 462 U.S. at 795, 797; *Mullane*, 339 U.S. at 315.

SUMMARY OF PRIOR PROCEEDINGS

I. The FCC's Prior Express Written Consent Rule

In February 2012, the FCC issued an order mandating that consent for advertising or telemarketing texts under the TCPA must be (1) signed and in writing and (2) contain a "clear and conspicuous disclosure" that the caller would use an autodialer and that consent was not a condition of purchase. *See* 2012 Order at 1863. Notably, the 2012 Order required telemarketers to obtain new consents from its telemarketing recipients, if their previous consents did not fully comply with the 2012 Order. *See id.* ¶ 68. However, the FCC granted telemarketers until October 16, 2013 (nearly two years) to comply with the new rule and obtain the compliant consents. *See id.* ¶ 66.

The day after the 2012 Order became effective, two organizations, the Coalition of Mobile Engagement Providers ("Coalition") and the Direct Marketing Association ("DMA"), petitioned the FCC seeking relief from the 2012 Order due to their confusion about its effect on previous consents. In response to those petitions, on July 10, 2015, the FCC issued an order reaffirming the 2012 Order's rules on prior express written consent. *See In re Rules & Regs. Implementing the TCPA of 1991*, 30 FCC Rcd. 7961 ¶ 100 (July 10, 2015) (hereinafter "2015 Declaratory Ruling"). Nevertheless, the FCC also granted the Coalition and DMA (and their members at the time) limited waivers, but only after "acknowledg[ing] evidence of confusion" on the part of the petitioners as to whether the 2012 Order grandfathered in the non-compliant consents they obtained prior to the 2012 Order's effective date. *See* 2015 Declaratory Ruling ¶ 101. No waiver was granted to Papa Murphy's or any other entities in the 2015 Declaratory Ruling.

II. Federal District Court Litigation against Papa Murphy's

John Lennartson commenced the *Lennartson* class action in the U.S. District Court for the Western District of Washington on May 7, 2015, on behalf of himself and a class of persons who received text messages from Papa Murphy's since October 16, 2013. *See* Ex. 1[4] (Compl.). Specifically, Lennartson alleged that calls to his cell phone and the cell phones of similarly situated class members were made without prior express written consent in violation of the TCPA. *Id.*

On September 24, 2015, Papa Murphy's moved for summary judgment in *Lennartson*, seeking an order from the District Court that the 2012 Order's prior express written consent rule did not apply to text messages it sent to consumers who previously provided written but non-compliant consent. *See* Ex. 2 (Summ. J. Mot.). In other words, Papa Murphy's argued "that post-October 2013, consent would have to adhere to the new requirements, but that, where 'prior written consent' exists, the individual would be effectively grandfathered intro the new scheme." *Id.* at 7. Lennartson opposed Papa Murphy's motion. *See* Ex. 3 (Summ J. Opp'n).

On January 5, 2016, the District Court rejected Papa Murphy's argument and held as follows:

> Papa Murphy's did not follow the 2012 Order's requirements, nor did it petition the FCC for clarification or relief …. *If the 2012 Order confused Papa Murphy's* it could have petitioned the FCC for relief years ago, as the Coalition of Mobile Engagement Providers and Direct Marketing Association did.

Ex. 4 (Summ. J. Order) at 7 (emphasis added). Indeed, Lennartson submitted evidence to the District Court showing that Papa Murphy's was not confused, but simply unaware of

[4] References to "Ex. __" are to the exhibits submitted contemporaneously herein, unless otherwise indicated.

the 2012 Order altogether. Specifically, Lennartson submitted archived pages of Papa Murphy's website demonstrating that it did not comply with the 2012 Order well after October 16, 2013. *See* Ex. 3 (Summ. J. Opp'n), Exs. A–D to Hoidal Decl. thereto. In other words, even after the 2012 Order went into effect, Papa Murphy's continued not to comply with the written consent requirement going forward.

III. Papa Murphy's FCC Petition for a Waiver

Only after affirmatively placing the issue before the District Court, and after the District Court ruled against it, did Papa Murphy's initiate parallel proceedings with the FCC to re-litigate the same issue. On February 22, 2016, Papa Murphy's filed a petition to the FCC seeking a retroactive waiver of the prior express written consent rule in the 2012 Order for any text messages it sent between October 16, 2013, and June 17, 2015, to individuals who had provided written consent to receive text messages from Papa Murphy's prior to October 16, 2013. Ex. 5 (Pet. for Waiver).[5] In its petition, Papa Murphy's failed to disclose to the FCC that the District Court presiding over the *Lennartson* case had already determined that the prior express written consent rule applied to Papa Murphy's, and that Papa Murphy's violated that rule, which they were then asking the FCC to waive. *See id.*

Papa Murphy's maintained in its petition that it was similarly situated to the Coalition and DMA, which received waivers in the 2015 Declaratory Ruling. But the facts belie that claim. The Coalition and DMA proactively filed their petitions the day after the 2012 Order became effective. Papa Murphy's, on the other hand, waited an additional two-and-a-half years (and more than nine months after Lennartson filed his

[5] Lennartson filed a comment opposing Papa Murphy's petition. Ex. 6.

Complaint) to file its petition, and only after it received an adverse ruling on the issue from the District Court. Moreover, the FCC "acknowledge[d] evidence of confusion" on the part of the Coalition and DMA about the effect of the 2012 Order on previous consents. 2015 Declaratory Ruling ¶ 101. In contrast, Papa Murphy's offered no evidence of confusion on its part to support its petition for waiver, relying only on the FCC's statements in the 2015 Declaratory Ruling that acknowledged the Coalition and DMA's confusion. *See* Ex. 5 (Pet. for Waiver) at 5. The only evidence submitted to support their petition, the Declaration of Andrew Brawley, made no mention of confusion as to the effect or language of 2012 Order.

Moreover, in opposing the petition, Lennartson submitted evidence to the contrary. Specifically, as it did to the District Court, Lennartson submitted to the FCC archived pages of Papa Murphy's website, dated January 31, 2014 and March 30, 2014. These pages do not contain the disclosures mandated by the 2012 Order.[6] *See* Ex. 6 (Pet. Opp'n), Exs. C & D thereto. If Papa Murphy's knew about and was confused by language in the 2012 Order regarding whether it could rely on previously obtained consents, it certainly would have known it could not rely on consents obtained without the proper disclosures after October 16, 2013. Again, this evidence demonstrates that Papa Murphy's was not confused by the 2012 Order but, rather, was unaware of the order.

[6] Papa Murphy's misrepresented to the FCC that it "did not condition receipt of promotions on consent to receive text messages." Ex. 5 (Pet. for Waiver) at 2–3. To the contrary, Papa Murphy's required consumers to join its text messaging program in order to receive "exclusive deals." *See* Ex. 5 (Summ. J. Opp'n), Ex. G to Hoidal Decl. (showing an advertisement encouraging consumers to "JOIN NOW AND RECEIVE EXCLUSIVE DEALS EVERY MONTH" and "text PAMPAM to 95323" to receive "FREE Cheesy Bread").

IV. The Bureau's Waiver Order

On October 14, 2016, the Chief of the FCC's Consumer and Governmental Affairs Bureau granted a limited waiver to Papa Murphy's and six other petitioners. Waiver Order ¶ 1 (October 14, 2016). In the Waiver Order, the Bureau held: "good cause exists to find that the instant petitioners needed additional time to obtain updated written consent in compliance with the Commission's 2012 rule changes, which were adopted under the … TCPA … to ensure that telemarketers have proof of consent from consumers to make robocalls." *Id.* ¶ 1. The basis for the Bureau's finding of "good cause" was that Papa Murphy's "demonstrated that [it was] similarly situated to petitioners previously granted relief" in the 2015 Declaratory Ruling. *Id.* ¶ 10. Specifically, the Bureau found that Papa Murphy's was similarly situated because:

> Each of the petitioners cites the same language from the 2012 order that the Commission later found reasonably caused confusion, and *there is no evidence in the record that refutes their claimed confusion*. Moreover, all seven of the petitioners reference the language in the Commission's 2012 order that may have led to the confusion. We find the seven petitioners have sufficiently demonstrated they incorrectly but reasonably interpreted the Commission's order to mean that their old written consents would remain valid after the new rules went into effect on October 16, 2013.

Id. ¶ 13 (emphasis added and footnotes omitted).

In concluding that Papa Murphy's was confused, however, the Bureau disclaimed the need for specific evidence of confusion necessary to its findings, and further failed to consider evidence offered to demonstrate that Papa Murphy's was not confused:

> We also reject arguments that the Commission made proof of confusion a requirement to obtain a waiver …. In the *2015 Declaratory Ruling*, the Commission did not require petitioners to plead specific, detailed grounds for individual confusion, and we do not believe there is any basis for imposing that requirement on these parties who assert that they were similarly situated. All of the petitioners asserted their general confusion regarding the new rule …. Based on the Commission's determination that parties could reasonably have been confused as to whether previously

> obtained written consent would remain valid, we find Papa Murphy's assertion sufficient.

Id. ¶ 16. In other words, the Bureau concluded that the plausibility of confusion was sufficient to justify a waiver, even in the face of evidence to the contrary.

ARGUMENT

I. The Waiver Order Failed to Articulate an Appropriate Standard for Good Cause and Erroneously Relieved Papa Murphy's of Its Burden to Prove Special Circumstances and Public Interest.

In issuing the Waiver Order, the Bureau erred in failing to articulate a relevant standard and in disclaiming the need for evidence from Petitioners to support the Bureau's conclusions. The Bureau effectively *presumed* confusion on the part of Papa Murphy's and the other petitioners. Papa Murphy's, however, did not even allege that it had been confused by any language in the 2012 Order, relying only on general statements in the 2015 Declaratory Ruling. The Bureau compounded its error of presuming confusion by ignoring evidence that, rather than being confused about the 2012 Order, Papa Murphy's was unaware of the order altogether.[7] Indeed, Papa Murphy's did not implement the 2012 Order until long after its effective date. It is therefore not surprising that the Bureau did not articulate any support for its finding that the waiver was in the public interest. For these reasons, the Waiver Order should be withdrawn.

[7] Because the evidence shows that Papa Murphy's did not comply with the 2012 Order for persons opting into its text message program even after the effective date of October 16, 2013, the other possibility is that Papa Murphy's simply ignored the requirements of the 2012 Order. Either way, Papa Murphy's was not confused and the granting of a waiver by the Bureau was erroneous.

A. The Bureau presumed confusion and failed to articulate a relevant standard.

The FCC's rules generally provide that "[a]ny provision of the [FCC's] rules may be waived by the [FCC] on its own motion or on petition if good cause therefor is shown." 47 C.F.R. § 1.3. Consistent with this requirement of good cause, before granting a waiver, the Bureau must make a specific finding of "special circumstances" and that a waiver will serve the "public interest." *Ne. Cellular Tel. Co., LP v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). In assessing each of those prongs, the Bureau must articulate a "relevant standard" to ensure that the decision to grant a waiver is not an act of "unbridled discretion or whim." *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (DC Cir. 1969). Because a waiver goes against the grain of regularity and consistency of an agency's conduct, "an applicant for waiver faces a high hurdle," and "must plead with particularity the facts and circumstances which warrant" a waiver instead of making "generalized pleas." *Id.* at 1157 & n.9. The person requesting a waiver must further "adduce concrete support, preferably documentary," of the "special circumstances" warranting a waiver. *Id.*; *see NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008).

Nowhere in the Waiver Order did the Bureau articulate the relevant standard for determining when special circumstances permit or bar the granting of a waiver. Further, the Bureau rejected the need for any evidence that Papa Murphy's was confused by the 2012 Order. Instead, the Bureau concluded that special circumstances of confusion warranted granting a waiver because, in its petition, Papa Murphy's cited language in the 2012 Order which the FCC later acknowledged could be confusing. The Bureau found that, because it did not have evidence that Papa Murphy's and the other six petitioners

were not confused, a waiver from the disclosure requirements of the 2012 Order was warranted. *See* Waiver Order ¶¶ 11, 12.

This was error. In expressly disclaiming the need for any concrete, individualized evidentiary findings and, instead, applying a presumption of confusion that shifted the burden of proof away from Papa Murphy's, the Bureau ignored proof requirements mandated by *WAIT Radio* and *NetworkIP*. Accordingly, the Waiver Order as to Papa Murphy's should be withdrawn.

B. Papa Murphy's did not even allege, much less demonstrate, that it was confused by any language in the 2012 Order.

The Bureau also erred in its presumption that Papa Murphy's was confused by the 2012 Order and, therefore, was similarly situated to the two petitioners (the Coalition and DMA) that received waivers in the 2015 Declaratory Ruling. While the FCC "acknowledge[d] evidence of confusion" on the part of the Coalition and DMA as to the effect of the 2012 Order on previously-obtained consents (2015 Declaratory Ruling ¶ 101), Papa Murphy's failed to even allege confusion, much less offer any evidence of it. Further, the Bureau ignored evidence demonstrating that Papa Murphy's was not confused by the 2012 Order, but unaware of it.[8] Therefore, special circumstances did not warrant a waiver, even under the rationale adopted by the Bureau.

In support of its petition, Papa Murphy's submitted the sworn declaration of Andrew Brawley, its email and mobile marketing manager. Ex. 5 (Pet. for Waiver), Brawley Decl. Notably, Brawley does not state in his declaration that he, or anyone

[8] Instead, as discussed above, the Bureau presumed Papa Murphy's was confused by the 2012 Order, simply because it cited allegedly confusing language (without alleging its own confusion) and because there was no evidence that it was not confused. Waiver Order ¶ 13.

connected with Papa Murphy's, ever read or was aware of the 2012 Order prior to or soon after its effective date. More importantly, Brawley does not claim that he, or anyone connected with Papa Murphy's, was confused about whether Papa Murphy's could continue to rely on non-compliant consents obtained prior to the effective date of the 2012 Order. Yet, this was the ostensible ground on which the Bureau granted Papa Murphy's a waiver.

The only vague allusion to Papa Murphy's state of mind about the language in the 2012 Order is the unsupported and unverified assertion by Papa Murphy's litigation counsel in its petition that "believing [pre-October 16, 2013] consent remained valid, Papa Murphy's did not re-opt in customers who signed up for its texting program prior to October 16, 2013." Ex. 5 (Pet. for Waiver) at 2. Such a generalized plea is insufficient to establish good cause for a waiver. *See WAIT Radio*, 418 F.2d at 1157 & n.9. Significantly, left unsaid in that generalized plea is whether this purported belief was because Papa Murphy's was confused by the 2012 Order or because Papa Murphy's was unaware of the 2012 Order until it was sued in mid-2015. The evidence before the Bureau strongly suggested the latter. Specifically, Papa Murphy's failed to follow the 2012 Order even after its effective date. Lennartson submitted to the FCC (as he did to the District Court) archived pages of Papa Murphy's website demonstrating that it did not comply with the 2012 Order well after October 16, 2013. *See* Ex. 6 (Pet. Opp'n), Ex. C & D thereto. In fact, Papa Murphy's failed to implement the 2012 Order until June 17, 2015—only after it was served with the *Lennartson* Complaint, and almost two years after the effective date of the 2012 Order. *See* Ex. 5 (Pet. for Waiver) at 2 & n.3. Papa Murphy's further conceded that it did not "examine" its text messaging program until it was sued by Lennartson in mid-2015. *Id.* (admitting that Papa Murphy's "complet[ed] a

comprehensive review of its text messaging program" after the *Lennartson* case). On June 17, 2015, apparently finally realizing that its text messaging program was not in compliance with the 2012 Order, Papa Murphy's shut it down. *Id.* In sum, until it was sued, Defendants did nothing to comply with the 2012 Order, suggesting it was unaware of the order. Such "simple ignorance of the TCPA or the Commissions' attendant regulations is not grounds of waiver." *In re Rules & Regs. Implementing the TCPA of 1991*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 ¶ 26 (Oct. 30, 2014).

In light of the above, the Bureau's finding that there was "no evidence in the record" that refuted Papa Murphy's "claimed confusion" has no basis in the record. Waiver Order ¶ 13. Similarly, there is no factual basis for the Bureau's finding that Papa Murphy's demonstrated that it "incorrectly but reasonably interpreted the Commission's order to mean that their old written consents would remain valid after the new rules went into effect on October 16, 2013." *Id.* Papa Murphy's did not come close to meeting the high burden for a petitioner to be granted a waiver under *WAIT Radio*. As such, the Bureau's grant of a waiver to Papa Murphy's should be withdrawn.

C. The Bureau erred in finding that granting a waiver to Papa Murphy's served the public interest.

Although the Bureau acknowledged the requirement that a waiver be issued only when it is shown to be in the public interest, the Waiver Order is devoid of any facts or analysis to support the Bureau's finding that a waiver to Papa Murphy's served the public interest. Essentially, the Bureau abdicated its responsibility to individually analyze the requests for waiver before simply concluding that all petitioners were similarly situated to each other and also similarly situated to the Coalition and DMA. This is contrary to the requirements of *WAIT Radio*.

By the same token, in granting blanket waivers to petitioners who did not establish special circumstances or that a waiver would be in the public interest, the Bureau failed to consider the public interest in favor of enforcing the 2012 Order, as articulated in the Order itself. 2012 Order ¶¶ 1, 26 (setting forth that the 2012 Order is necessary to protect consumers and that enforcement of the enhanced disclosure requirements is necessary to prevent advertisers from erroneously or fraudulently contending that they received permission to send text message ads to persons who do not want to receive them).[9] The only public interest argument advanced in Papa Murphy's petition is the potential of "subjecting Papa Murphy's to significant liability," and its interest in relieving it of its litigation costs—both of which fall decidedly short of the standard. Ex. 5 (Pet. for Waiver) at 5. As the FCC has recognized, the "risk of substantial liability in private rights of action is, by itself, [not] an inherently adequate ground for waiver."[10] Papa Murphy's cited to no authority for the proposition that the public interest is served in relieving a corporation of the private costs necessary to defending indisputably meritorious TCPA claims.

If the Bureau were to consider the costs of litigation, it must necessarily also consider the substantial costs that Petitioner Lennartson has incurred to prosecute his case, which were expended only because he relied on the protections of the 2012 Order. The public interest analysis should also take into account that Papa Murphy's waited two-

[9] By definition, the public interest is not served by a blanket waiver, based on presumed confusion of waiver applicants. All any entity need do to avoid application of the 2012 Order is cite the alleged confusing language to be entitled to a waiver from its disclosure requirements. In addition to violating *WAIT Radio*, as discussed above, such a precedent has no bounds and creates a loophole that improperly vitiates the protections and mandate of the 2012 Order. Such a result is plainly not in the public interest.

[10] *In re Rules & Regs. Implementing the TCPA of 1991*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 ¶ 28 (Oct. 30, 2014).

and-a-half years after the issuance of the 2012 Order to file its petition for waiver and only after the District Court ruled that Papa Murphy's could not rely on non-compliant, pre-October 16, 2013 consents. These fact weigh heavily against a finding that a waiver should be issued in these circumstances.

In any event, Papa Murphy's interest in escaping liability in a civil action and avoiding the expense of defending a meritorious lawsuit is heavily outweighed by Petitioners Lennartson and Nohr's consumer privacy rights, which the TCPA expressly protects.[11] In just the few weeks since the Waiver Order was issued, Petitioner Nohr along with several other individuals have stepped forward and intend to join Petitioner Lennartson in pursuing claims on behalf of themselves and thousands of consumers subjected to Papa Murphy's text message advertisements. These consumers have provided additional insight into the nuisance caused by Papa Murphy's text advertisement program, which often included promotional coupons that were not honored in stores. Moreover, if the Waiver Order retroactively extinguishes Petitioners Lennartson and Nohr's private right of action under the TCPA, the Bureau would undermine the public interest of encouraging private litigation under 47 U.S.C. § 227(b)(3)—an essential part of the tripartite enforcement structure Congress created. *See* 47 U.S.C. §§ 503(b)(1) & 227(g)(1); *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 688 (7th Cir. 2013).

[11] Congress enacted the TCPA in response to "[v]oluminous consumer complaints" and "outrage[]" over the proliferation of intrusive, nuisance telemarketing practices. *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744–45 (2012). In doing so, Congress sought to "protect the privacy interests of telephone subscribers," *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009), by providing consumers an effective way to protect their privacy interests. *See, e.g., Hooters of Augusta, Inc. and Sam Nicholson v. Am. Global Ins. Co. & Zurich Ins.*, 272 F. Supp. 2d 1365, 1375–76 (S.D. Ga. 2003) (concluding after reviewing the extensive legislative history that the TCPA is a remedial statute).

In sum, relieving Papa Murphy's from the 2012 Order now—two-and-a-half years after it went into effect, after the District Court already ruled on its applicability to Papa Murphy's conduct, and without any evidence indicating that Papa Murphy's was confused about the requirements—would not serve, but only impair, the public interest.

II. In the Alternative, the Waiver Order Should Be Modified to Clarify that It Does Not Operate to Vitiate Previous Orders from the District Court.

To the extent that the Waiver Order is not withdrawn in light of the Bureau's failure to articulate and apply the appropriate standard for good cause, the Bureau should alternatively modify the Waiver Order to clarify that it does not extinguish the claims in the *Lennartson* class action because (A) the Bureau does not have authority to waive a statutory cause of action, (B) doing so would violate separation of powers, (C) the waiver order is an adjudicatory rule, and (D) the general savings clause bars it.

A. The Bureau lacks authority to retroactively waive pre-existing statutory causes of action.

It is axiomatic that an agency can only do what Congress has authorized it to do. In other words, "an administrative agency … may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125–26 (2000) (citation omitted). Consequently, an agency cannot impair a statutorily created right of action unless it has Congressional authorization to do so. *See, e.g.*, *Nat. Resources Defense Council v. E.P.A.*, 749 F.3d 1055, 1063 (D.C. Cir. 2014) (administrative agency lacked authority to create affirmative defense to private right of action established by Clean Air Act); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649–50 (1990) (Department of Labor lacked authority to determine that injured workers who received state workers' compensation benefits could not assert statutory claims against their employer).

Here, the TCPA's private right of action is based on a statute enacted by Congress. *See* 47 U.S.C. § 227 (b)(3)(A) & (B) (providing the right to bring "an action based on a violation of … the regulations prescribed under this subsection," and empowering an "appropriate court," not the Bureau, to determine whether a violation has occurred). The TCPA does not provide the Bureau with authority to waive or otherwise impair a private cause of action that arises under the statute, and this absence underscores that the Bureau lacks such authority. *See Brown v. Gardner*, 513 U.S. 115, 120 (1994) (Where "'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"); *Nat. Resources*, 749 F.3d at 1063–64.

Similarly, two TCPA provisions, 47 U.S.C. §§ 227(b)(2)(B) and (C), give the FCC the power to grant certain exemptions, but neither empowers the FCC to exempt a party from liability under 47 U.S.C. § 227(b)(3). Once again, where Congress meant to give the FCC the power to make portions of the TCPA inapplicable, it explicitly did so, confirming that the Bureau lacks authority to waive a private right of action. Nor can the FCC claim any implied delegation of such authority. *See Adams Fruit*, 494 U.S. at 650 ("Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'").

Finally, the Bureau cannot derive any authority for impairing that private right of action from 47 C.F.R. § 1.3, which generally enables the Commission to waive the requirements of administrative enforcement of a *regulation*, but not a cause of action already accrued under a *statute* for violation of a regulation. *See, e.g., Nat. Ass'n of*

Broads. v. F.C.C., 569 F.3d 416, 426 (D.C. Cir. 2009) (stating that "the Commission has authority under its rules, *see* 47 C.F.R. § 1.3, to waive requirements not mandated by statute where strict compliance would not be in the public interest").

Thus, based on the statutory mandate of the TCPA, the regulations thereunder, and the case law construing them, the Waiver Order does not operate to extinguish Petitioners' private statutory claims against Papa Murphy's. The Waiver Order should be modified to confirm that it does not have this effect.

B. Permitting the Waiver Order to extinguish private claims would violate the separation of powers doctrine.

To the extent the Waiver Order impairs TCPA claims that Lennartson has asserted in a pending judicial proceeding before the District Court—an Article III court—and operates to vitiate any Court orders or findings of law, it intrudes upon the province of the judiciary. *See Adams Fruit*, 494 U.S. at 650 (rejecting Secretary of Labor's attempt to limit private right of action "because Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute").[12] Addressing this exact issue, a federal court held that

> the FCC cannot use an administrative waiver to eliminate statutory liability in a private cause of action; at most the FCC can choose not to exercise its own enforcement power …. It would be a fundamental violation of the separation of powers for the administrative agency to 'waive' retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III court.

Physicians Healthsource, Inc. v. Stryker Sales Corp., 65 F. Supp. 3d 482, 498 (W.D. Mich. 2014) (citation omitted); *see also Fauley v. Heska Corp.*, 112 F. Supp. 3d 775, 778

[12] *See also City of Arlington v. F.C.C.*, 133 S. Ct. 1863, 1871 n.3 (2013) (reaffirming that "*Adams Fruit* stands for the modest proposition that the judiciary, not any executive agency, determines 'the scope'—including the available remedies—'of judicial power vested by' statutes establishing private rights of action").

(N.D. Ill. 2015) (same). As discussed, not only are Lennartson's private statutory claims proceeding under the jurisdiction of an Article III court, but that District Court has also already made findings that the 2012 Order applied to Papa Murphy's, and that Papa Murphy's violated the 2012 Order. To the extent the Waiver Order attempts to undermine the District Court's jurisdiction or orders, it violates the constitutional separation of powers principles and the case law construing them. Therefore, the Waiver Order should be modified to confirm that it does not operate to retroactively extinguish an existing cause of action placed in the jurisdiction of an Article III court.

C. The Waiver Order is an adjudication that cannot apply retroactively to extinguish private claims.

The Waiver Order created a de facto rule that any petitioner who cites potentially confusing language in the 2012 Order is similarly situated and entitled to a waiver. That rule should not be applied retroactively given the inequities such an application would cause. Papa Murphy's has itself argued that adjudicatory rules should not have retroactive effect where inequitable:

> When an administrative agency acts through adjudication to alter standards with which an entity must comply, such standards will not have retroactive application if doing so would create inequities. *See SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (stating an agency may give retroactive force to a new rule created through adjudicatory action, but "[the] retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles").

Ex. 2 (Summ. J. Mot.) at 10–11; *see also Montgomery Ward & Co. v. F.T.C.*, 691 F.2d 1322, 1328 (9th Cir. 1982) ("[W]hen a new problem is presented to an administrative agency, the agency may act through adjudication to clarify an uncertain area of the law, so long as the retroactive impact of the clarification is not excessive or unwarranted.").

A five-factor test for determining whether an adjudicatory rule may have retroactive effect was applied by the D.C. Circuit in *Retail, Wholesale and Department Store Union v. N.L.R.B.*, 466 F.2d 380 (D.C. Cir. 1972):

> [R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles …. Among the considerations that enter into the resolution of the problem are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Id. at 390. This test was later adopted by the Ninth Circuit. *See Montgomery Ward*, 691 F.2d at 1333–34. Each of the five factors weighs against retroactive application of the Waiver Order here.

First, the Waiver Order does not constitute a "case of first impression" for two reasons: (1) the FCC previously articulated the standard for prior express written consent in its 2012 Order, which it then altered in its Waiver Order upon receipt of waiver petitions by Papa Murphy's and other entities, and (2) Papa Murphy's already affirmatively presented this same issue—whether the requirements of the 2012 Order should be applied to its conduct—to the District Court in which its violations are being litigated. When a standard has already been articulated and the agency changes that standard in subsequent rulings, it is not a case of "first impression." *See Retail, Wholesale*, 466 F.2d at 391. On both counts, this factor militates against retroactive application.

Second, the Waiver Order represents "an abrupt departure from well-established practice" and does not "fill a void in an unsettled area of law." The 2015 Declaratory

Ruling expressly reaffirmed the validity of 2012 Order's prior express written consent rule, and did not grant a universal waiver to similarly situated entities. The Waiver Order represents an abrupt shift from that settled precedent. Not only did it vitiate the protections of the 2012 Order that governed Papa Murphy's conduct for the last three years, but it also abruptly articulated a rule that now permits any entity to obtain a waiver if it merely cites to the potentially confusing language in the 2012 Order, without any burden of proof. *See supra* Argument I. The Waiver Order, therefore, renders the 2012 Order a nullity, and this factor weighs against retroactive application.

Third, the parties "against whom the new rule is applied," including Lennartson and those similarly situated, have plainly and reasonably "relied on the former rule." The "longer and more consistently an agency has followed one view of the law, the more likely it is that private parties have reasonably relied to their detriment on that view." *Clark–Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082–83 (D.C. Cir. 1987). Here, the FCC and Lennartson expected the prior express written consent requirement to govern the conduct of text advertisers on the effective date of the 2012 Order. The 2015 Declaratory Ruling further reaffirmed the validity and mandate of the 2012 Order. Consequently, Lennartson commenced and pursued litigation and expended significant resources based solely on these settled rules, which have been in force for more three years, but were purportedly overturned. Accordingly, the Petitioners reasonably relied on the FCC's prior ruling in the 2012 Order to their detriment, and this factor, too, weighs against retroactive application.

Fourth, because Lennartson and the putative class have been extensively litigating their TCPA claims for more than a year, the "degree of burden" the Waiver Order has

imposed upon them, by purporting to undermine the entire statutory basis of their claims and undermining the federal District Court's previous findings, is unquestionably severe.

Finally, the "statutory interest in applying a new rule"—in this case, the abrogation of an existing rule—is nonexistent. To the contrary, the Waiver Order discourages private parties from enforcing the TCPA and increases the burden on the FCC to police individual entities' compliance with the statute.

Accordingly, the Waiver Order fails to satisfy each of the five factors in the *Retail, Wholesale* test, and cannot apply retroactively to extinguish ongoing litigation under the jurisdiction of the District Court. The Waiver Order should be amended to clarify that it does not have retroactive effect on Petitioners' private statutory claims.

D. The general savings statute bars the Bureau from retroactively extinguishing TCPA liability.

1 U.S.C. § 109 provides, in pertinent part, that the repeal of any statute does not retroactively extinguish liabilities previously accrued under the statute unless the statute expressly, or by plain import, provides for such extinguishment. *See Dorsey v. United States*, 132 S. Ct. 2321, 2332 (2012). Accordingly, if Congress wanted to grant itself or the FCC power to retroactively extinguish private causes of action, Congress would have done so in the express language of the TCPA. *See, e.g., Wash. Metro. Area Transit Auth. v. Beynum*, 145 F.3d 371, 372–73 (D.C. Cir. 1998) (claim for compensation for injury incurred before repeal of workers' compensation statute should be decided under repealed statute because new statute did not retroactively extinguish such liability under old statute). But Congress did not provide authority for retroactive release of any pre-existing liability under the TCPA, 47 U.S.C. § 227(b)(3), much less that a private right of action could be abrogated by an administrative agency. Thus, the Bureau's attempt to

extinguish private plaintiffs' right of action to pursue TCPA claims in light of the Waiver Order conflicts with 1 U.S.C. § 109 and the case law construing it. *See, e.g., La. Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (FCC, like other federal agencies, "literally has no power to act ... unless and until Congress confers power upon it").

CONCLUSION

For the foregoing reasons, the Federal Communications Commission should withdraw the Waiver Order or, in the alternative, modify it to confirm that it does not impact the claims currently proceeding before the District Court in the *Lennartson* case.

DATED this 14th day of November, 2016.

Respectfully submitted,

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APPENDIX OF EXHIBITS

Exhibit No.	Date	Description
1	05/07/15	Class Action Complaint with Exhibit A filed in *Lennartson v. Papa Murphy's*; No. 3:15-cv-05307 (W.D. Wash.)
2	09/24/15	Defendants Papa Murphy's Motion for Summary Judgment or, in the Alternative, for Stay
3	10/13/15	Plaintiff Lennartson's Opposition to Defendants' Motion for Summary Judgment or, in the Alternative, for Stay
	10/13/15	Declaration of June Hoidal with Exhibits A-D and G (Exhibits E and F omitted)
4	01/05/16	Order Denying Summary Judgment and Staying the Case
5	02/22/16	Papa Murphy's Holdings, Inc. and Papa Murphy's International L.L.C. Petition for Waiver; CG Docket No. 02-278
	02/22/16	Declaration of Andrew Brawley in Support of Petition for Waiver
6	02/22/16	Lennartson's Opposition to Papa Murphy's Holdings, Inc. and Papa Murphy's International, LLC's Petition For Waiver with Exhibits A-G

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2016, I caused the foregoing Petition for Reconsideration of Retroactive Waiver to Papa Murphy's Holdings, Inc. and Papa Murphy's International L.L.C. to be served on the parties listed on the attached service list via the Electronic Comment Filing System and First Class Mail.

I further certify that I also served an electronic courtesy copy on counsel for Papa Murphy's Holdings, Inc. and Papa Murphy's International L.L.C. via e-mail.

s/ June P. Hoidal
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